No. 268.

Brief of Hagan for D. G.

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IN THE

Supreme Court of the United States.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHARLES HABER, ET AL.,
Defendants in Error.

No. [redacted] 26

BRIEF OF DEFENDANTS IN ERROR.

IN THE

Supreme Court of the United States.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff in Error, vs. CHARLES HABER, ET AL., Defendants in Error.	No. 664.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

For a year or more prior to 1892, Hosier Brothers owned a large ranch, about forty miles square, in Pecos county, Texas, which fronted on the west side of Pecos river, about the mouth of Independence creek. On this ranch they held a large number of cattle, which were accustomed to range up and down the Pecos river and on both sides of the river in the counties of Pecos, Val Verde and Crockett, on both sides of the government quarantine line.

In the early part of the year 1892, they determined to bring two or three thousand of these cattle to Kansas to be put upon pasture and prepared for market. They engaged Brogan & Son, who controlled a large pasture in the southeast part of Chase county, Kansas, to take these cattle into their pasture, and negotiated with the Atchison, Topeka & Santa Fe Railway Company, and the Missouri, Kansas & Texas Railway Company, about shipping these cattle from Texas to Kansas.

The Santa Fe company had a station—Bazaar—quite near the Brogan pasture, while the nearest station on the Missouri, Kansas & Texas was Hartford, some twenty-five miles from the Brogan pasture. The business was sought after by the agents of the company, and the negotiations finally resulted in a contract being made with the Missouri, Kansas & Texas to ship from Midland, a station on the Texas Pacific Railroad, in Texas, to Hartford, at a rate of ten dollars per car less than the Santa Fe company would do the business for.

Brogan claimed on the trial that the railway company agreed to pay him for driving the cattle from Hartford to his ranch in consideration of his aiding the company in securing the shipment over its road instead of the Santa Fe.

Midland, the station from which the shipments were made, is north and west of the quarantine line established by the Bureau of Animal Industry, but the line of the Texas Pacific Railroad crosses into the infected district a short distance east from Midland, and the whole route over which the cattle were shipped, thence to the south line of Kansas, is included in the infected district. The Hosier ranch is immediately west of and adjoining this line. The range over which these cattle roamed was on both sides of this line, east and west, within and without.

The location of the Hosier Brothers' ranch was fully known to the officers of the Missouri, Kansas & Texas company who made the contract for the transportation of these cattle, and it was known to them that the cattle were upon this ranch and were to be driven from there to Midland for shipment, and that they were to be driven across the country from Hartford to the Brogan pasture, for the purpose of being pastured there.

On April 28 and 29, and May 10, 1892, some nineteen hundred head of these Hosier Brothers' cattle were shipped from Midland, billed through to Hartford. They had, in the few days preceding those dates, been driven up from the Hosier Brothers' ranch. Permits on the forms authorized by the Board of Live Stock Commissioners of the State of Kansas, based upon the affidavits of two men in Texas, had been issued to Hosier Brothers to ship these cattle, by Albert Dean, United States Live Stock Inspector, who also acted for the Kansas Live Stock Board.

When these shipments reached Fort Worth, on their way east and north, they were inspected by Howard

Rhodes, an inspector of the Bureau of Animal Industry, United States Department of Agriculture, who there observed, without any difficulty, that about half of them had upon them a parasitic insect called a Texas fever cattle tick, or, for short, a Texas cattle tick. The presence of this tick appears, from the testimony of the experts, Mr. Rhodes, Mr. Rodgers and Dr. Richards, to be strong, and when found on cattle from a low southern altitude, certain evidence of the liability of such cattle to impart Texas, splenic, or Spanish fever to native or northern cattle.

At Parsons, Kansas, these cattle were again observed by A. M. Hunter, another government inspector, but because they were accompanied by the permit of his superior officer, Albert Dean, they were allowed to proceed. He, however, noticed the ticks, and, having his suspicions aroused as to the safety of the cattle, communicated his suspicions to the officers of the Missouri, Kansas & Texas company at the time, and he and Mr. Worth, the train master of that road, at Parsons took a passenger train and followed up these trains of stock to Hartford, and, having again observed the cattle, he told Mr. Worth that they would "set the country afire."

The cattle were, however, unloaded in the company's pens at Hartford and from thence driven, under the direction of Brogan, west, across Lyon and into Chase county, to the Brogan pasture, and over every foot of this twenty-five mile drive scattered the germs of Texas, splenic or Spanish fever, so that in due course of germination the native cattle were attacked thereby and hundreds of them died, to the damage of about one hundred and fifty farmers and cattlemen, in the sum of at least fifty thousand dollars.

The amended petition, on which this action was tried to a jury, set out in brief the above facts. It alleged that the Missouri, Kansas & Texas Railway Company "had

knowledge * * * and had reason to know that said Texas cattle so kept, shipped, transported and driven were a kind capable of communicating, and liable to communicate and impart, said disease to the domestic cattle of this state, and to the cattle of the plaintiff." And it further alleged that the acts so done were in contravention of the laws of the State of Kansas.

This amended petition made as defendants, not only the Hosier Brothers, the owners of this Texas herd, but the railway company and Brogan & Son, and also all of those who lost cattle by reason of the infection.—A provision of the Kansas Statute gives, for damage suffered, a lien upon the cattle distributing the disease, so that all who lost were jointly interested.

The railway company answered with a general denial, and further—so far as the same raised any Federal question—substantially, that it was a common carrier engaged in interstate commerce. That it received from a connecting carrier the cattle mentioned, at Denison, Texas, without any knowledge of their dangerous character. That the cattle were shipped from without the quarantine line established by the Secretary of the Department of Agriculture, and that because they were thus shipped and because they came immediately from a territory, adjudged by the Department of Agriculture to be safe, that the railway was protected in their shipment, no matter how dangerous the cattle proved to be to the cattle industry of Kansas.

In other words, that the United States Government by the acts establishing the Bureau of Animal Industry, and the Secretary of Agriculture in his orders and acts carrying the same in execution, had assumed to take the entire question of the interstate shipment of dangerous animals away from state control, and had thereby authorized and permitted such shipments. And that the

defendant railway company was justified in such shipments, and protected from the damages caused thereby.

The interpleading defendants filed answers similar in tenor to the petition of plaintiff Haber, and the issues were closed by general denials.

Upon these issues the parties went to a jury. The plaintiff took the burden of showing that the officers of the railway company had knowledge of the dangerous character of these Texas cattle, or knowledge of such facts as would import such knowledge. He showed that the officers with whom the contract of shipment was made, were informed as to where the cattle were to come from —page 54, printed record. That the ticks were easily detected—pages 134, 135, 50, 96, 101, 102, printed record. That the presence of these ticks was a sign of danger—pages 134, 138, 139, 149, 150, 154, 155, printed record. That the establishment of the quarantine line was mere guess work and gave no assurance that cattle from without were safe—page 256, printed record. That officers of the road, either Coley, agent at Parsons, or Worth, the train master at the same place, were informed by Hunter of the dangerous character of these cattle—page 51, printed record—and that incited thereby, Worth followed them up to Hartford, but did not interfere with their being unloaded. That again, on their way back from Hartford and in ample time to have had the drive stopped—the cattle at the time not having left the pens—Hunter told Worth that they would "set the country afire."

The trial court pursuing the theory of the plaintiff of a common law liability as well as a statutory one, instructed the jury that in order for them to find for the plaintiff they must find from the evidence "that the officers, employees, or agents of the railway company defendant had knowledge that such Texas cattle, transported by it into this state, were liable to impart such disease to the native cattle of this state, or that they ought by the exer-

cise of diligence and care to have known of the dangerous character of these cattle, and that they would, or were liable, to impart said disease to the native cattle of this state." Again, "The fact that it (the railway company) "did bring them (the cattle) from some point on its line "of road south of the south line of Kansas, makes it liable, "*provided* it had knowledge, if such is the fact, of the "dangerous character of these cattle, or ought to have "known it under the instructions heretofore given you." Again, "It is the duty of any one in pursuit of any lawful "business to exercise due care and caution that others "shall not be injured thereby; and while a common car-"rier, such as is the defendant railway company, is bound "to accept for transportation any freight tendered it which "it may be lawful to carry, it must exercise due care and "caution in doing this that it does not invade the rights of "others, and it is not required to take for transportation, "or to transport, any article forbidden by the law to be "transported, or the transportation of which will injure "others, provided it can ascertain by due diligence, that "such article is liable to injure or cause damage to those "with whom it may come in contact during its transpor-"tation or at its destination."

The jury found a general verdict in favor of the plaintiff and also in favor of the one hundred and forty-five cross-petitioning defendants.

The case was taken on error by the railway company to the Supreme Court of Kansas where it was affirmed, and now is brought to this Court on error by said company. This statement of facts is taken quite largely from the statement of facts found in 56 Kansas, page 654, where this case is reported.

SYLLABUS OF BRIEF.

First. There is no Federal question involved, and this Court has no jurisdiction of this cause, and therefore the writ of error should be dismissed, because:

(*a*) There was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, etc., nor was the decision against their validity.

(*b*) The validity of no law of Kansas was drawn in question which was repugnant to the Constitution, treaties or laws of the United States.

(*c*) The decision of the State Court was not against any title, right, privilege, or immunity claimed under the Constitution or any treaty, or statute of, or commission held or authority exercised under, the United States.

Second. This court is without jurisdiction even though there is a Federal question presented, because the pleadings, proof and decision were broad enough to sustain the judgment under the Common Law.

Third. There is no conflict between the United States statute and the State law.

Fourth. The Kansas laws involved were a proper and warranted exercise by the State of its inherent police power.

Fifth. If this court has technical jurisdiction and a Federal question is involved, such Federal question was properly decided by the State Supreme Court; and its judgment should be affirmed.

BRIEF OF DEFENDANTS IN ERROR.

There is no Federal question involved, and this Court has no jurisdiction of this cause, and therefore the writ of error should be dismissed, because:

(a) There was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, etc., nor was the decision against their validity.

(b) The validity of no law of Kansas was drawn in question which was repugnant to the Constitution, treaties or laws of the United States.

(c) The decision of the State Court was not against any title, right, privilege, or immunity claimed under the Constitution or any treaty, or statute of, or commission held or authority exercised under, the United States.

We state the cause in our amended petition, and on which issues were joined (Record, pages 8 and 9), as follows:

"That the defendants, Hosier Brothers, owned and kept in the State of Texas two thousand three hundred head of wild, undomestic cattle, and at a point south of the thirty-seventh parallel of north latitude, (the same being the southern line of Kansas), and all of said cattle were afflicted with Texas, splenic, or Spanish fever, and liable to and capable of communicating said disease to any of the native cattle of Kansas; that between April 1 and July 15, 1892, said defendants, Hosier Brothers, the Missouri, Kansas & Texas Railway Company and * * * * * kept, shipped, transported, drove and brought said two thousand three hundred head of Texas cattle from a point in Texas south of the thirty-seventh parallel of north latitude, into the State of

Kansas, in violation of an act of the legislature of the State of Kansas, entitled, 'An Act for the protection of cattle against contagious diseases,' and known as chapter 161 of the Laws of 1881, and acts amendatory thereof and supplemental and additional thereto," and averred damages and prayed judgment. Plaintiff also made all parties who had lost cattle by this disease and all who claimed liens thereon, defendants in said amended petition.

The defendants who had suffered from this scourge answered making claim for their damages same as the plaintiff.

The so-called Federal question, quite elaborately set out in the above "Statement of Facts," is embraced in the fourth defense of amended answer of defendant railway company, commencing at line twenty-five, page twenty-one, printed record, and ending with line forty-five, page twenty-two.

When legally stated this assumed Federal question is this and nothing more:

First. The Congress on May 9, 1884, passed an act entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," and that the Congress again, on April 4, 1891, passed another act making appropriations for the Department of Agriculture; and,

Second. That on February 26, 1892, the secretary of the Department of Agriculture issued a circular under section seven of the act of 1884 and caused the same to be served on railroad companies, and that these acts and circular were superior to any state law and protected the railway company in all it had done in the premises. (Printed record, pages 26, 27 and 28.)

It will be noticed that said section seven simply requires the Department of Agriculture to notify railroad companies. It nowhere suggests that such department make any quarantine regulations. It nowhere suggests that the officer make a map of the country and draw an imaginary line, on one side of which is comparative safety and on the other side of which danger lurks.

The whole act of 1884 shows that the Congress was seeking to exterminate diseases; not to protect railroads in disseminating disease broadcast by dumping dangerous animals into and driving them through a sovereign state; nor does it anywhere suggest that the proper police regulations of a state may be ignored and trampled upon.

In no sense does the legislation of Congress conflict with the legislation of Kansas.

First. In the matter of jurisdiction; we do not mean that of our State Courts; but of this Court.

It was asserted by this Court, in 8 Peters, 323:

"It must be conceded that the court of *dernier* resort in every state decides upon its own jurisdiction, and upon the jurisdiction of all inferior courts to which its appellate power extends."

Second. The assumed jurisdiction of this court is not inherent: it is not conferred by the constitution, and if it exists at all in the case at bar it is from and because of section 709, Revised Statutes, United States, which reads:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the *validity* of a treaty or statute of, or an authority exercised under, the United States, and the *decision is against* their *validity;* or where is drawn in question the *validity* of a statute of, or an authority exercised under, any state on the ground of their being *repugnant* to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

As the assumed jurisdiction is confined to, and conferred by this section, the section is naturally and necessarily re-

strictive. Nothing is to be taken by intendment and nothing interpolated by construction or analogy; and whatever is not there embraced is per force excluded.

If a pleader should attempt to assert a right because of some written instrument or statute which he pleaded, and the instrument or statute negatived all such right, we claim as matter of pleading that the pleader has not asserted such right. If the Federal Statute to which the pleader refers clearly shows, by its language, its context, and the subject matter of legislation, that no such assumed right is guaranteed nor exists, and that there is no conflict whatever between the State law and the supposed Federal law or regulation, we then insist, as matter of law, and as a fair construction to be given the limited and restricted jurisdiction of this Court, that the thing claimed or assailed, as the case may be, is not "drawn in question."

As above stated, the only real *claim* legally made by plaintiff in error is that the act of Congress referred to in its fourth defense authorized the Secretary of Agriculture to do what he could alone, or in connection with the State authorities, to stamp out a dreaded disease and protect the native herds from its ravages; and that the secretary did issue some regulations, no element of which was permissive, or granted any authority, but were all restrictive and bristling with limitations upon what might be ordinarily called the rights of a common carrier. Indeed Congress undertook to and did limit and restrict the carrier's previous rights. It did not even assume to grant the carrier any rights, nor did it assume to restrict the powers of a State.

It does not occur to us that any one of the three grounds, embraced in said section as warranting the jurisdiction of this court, exists.

It must be borne in mind that the suit below did not involve the suppression or extermination of disease among cattle; that it had nothing whatever to do with the interstate commerce of the country; but was simply an action to recover damages for negligence and wrong, amply stated for a common law action, but more especially predicated upon the Kansas Statutes hereafter quoted.

Were it not for the fact that the Kansas Statutes gave us a lien and our law of liens authorized us to make all parties in interest parties to one suit, we need not have mentioned the Kansas Statute, but relied wholly upon the common law. This Court will not consider whether the Kansas Courts properly construe our lien laws.

No act of Congress ever assumed to take any action in regard to this question of damage. Hence, under the first clause of section 709, it cannot be affirmed that there was drawn in question the ***validity*** of any treaty or ***statute*** of the United States. A Federal Statute was discussed and construed by the State Court, but its validity was never drawn in question; and as no act of Congress and no circular or order of the Department of Agriculture ever assumed to say that under any set of circumstances existing in this record was the shipment of cattle into Kansas, and thence to be driven through our native herds, to be done with impunity and without damage. Hence, no authority exercised under the United States, by anyone, was ever "drawn in question."

It may be asserted by a reckless pleader under the second clause or right, that any and every act of a State is repugnant to the Constitution and laws of the United States, but when such laws are pleaded and appear at first blush, in so far as they may approach the same ground, in perfect harmony with the Federal laws, it is insisted that such State law is not "drawn in question."

There can be no pretense that any "title, right, privilege or immunity" claimed under the United States, was ever drawn in question in the State Courts, nor was there any decision against such title, right, privilege or immunity.

The State Courts held every Federal Statute and every action of the Secretary of Agriculture valid. It held, and we think properly, that the acts of the plaintiff in error were plainly in violation of the Federal Statute, but the court did not hold that the Kansas laws were repugnant to any Federal law or authority, but that they were in strict harmony therewith. Suppose the State Court erred in this and that the railroad company had not violated a Federal Statute; that would not raise a "Federal question." The averments of the

railroad company's answer show that it did not have any rights under any Federal law, power or authority, which could in any manner be involved in this case. The company's answer *assumed* things that the pleaded act of Congress did not confer but clearly denied.

To state the matter in another form:

Under the first clause the decision was not against the validity of any Federal law or authority; hence could have no application to the case at bar. Under the second clause we concede that the decision was in "favor" of the "validity" of the Kansas Statue, but insist that the court could and did decide it on other grounds broad enough to sustain the decision, and therefore the so-called Federal question should be ignored.

Until we hear some reason why the third clause of section 709 can possibly apply, we shall assume it does not. It may be asserted that the railroad company "claimed privilege or immunity," but its statement of the Federal authority which it claimed granted such "privilege or immunity," clearly gave none, but denied the existence thereof.

As we construe the law and decisions thereunder, a Federal question must exist as a matter of law and fact, and not be *manufactured* by a naked assertion. Or, as stated by this Court in Millingar vs. Hartupee, 6 Wall., 261:

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this Court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words The act would have given jurisdiction in cases of decisions against *claims* of authority under the United States.

In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking to the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this Court could review the decision of a State Court, that the right claimed did not exist."

It is to be noticed that it is an *actual, existing* "title, right, privilege, or immunity" which is "claimed" and which is set up and relied on; not that there is such a claim made—not that the pleader simply "claims" a "title, right, privilege or immunity"; but that the thing he "claims" *is such* when "claimed" and when so "claimed" that it appears an existing reality. That an *examination* of the law, treaty or authority, shows it is what is claimed for it.

This Court has frequently stated that it will not examine the pleadings in the record to see whether the State Court properly ruled thereon.

Grand Rapids & Ind. R. R. Co. vs. Butler, 159 U. S., 87.

This Court has also said:

"Where the validity of a State law is not drawn in question, but merely its construction, no Federal question arises."

Lloyd vs. Matthews, 155 U. S., 222, 227.

"It must be that such question was necessarily involved in the decision, and that the State Court would not have given judgment without deciding it."

R. R. Co. vs. Peck, 4 Wall., 180-1.

We here quote the entire opinion in Hammond vs. Johnson, 142 U. S., 73, 78.

"It is well settled that where the Supreme Court of a state decided a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

In Eustis vs. Bolles, 150 U. S., 361, 366, this Court says:

"It is settled law that to give the Court jurisdiction of a writ of error to the State Court it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming a right under the Federal Constitution, or that the judgment, as rendered, *could not* have been given without deciding it."

In Jenkins vs. Loewenthal, 110 U. S., 222, it is said:

"Where the record disclosed two defenses to an action brought in a State Court, one presenting a Federal question and one presenting no Federal question, either of which, if sustained, was a complete defense to the suit, and that the State Court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this Court will affirm the judgment below without considering the Federal question."

In Scott vs. Jones, 5 How., 374, it is stated:

"This being a writ of error to a State Court, sued out with a view to reverse its decision, * * * * the only authority and the only ground for our interference with the decision of the State tribunals is in substance, that they have overruled some right or defense set up under an act of Congress, or treaty, or Constitution of the United States. 14 Pet., 46, 353; 12 Pet., 66; Williams vs. Norris, 12 Wheat., 124."

In this connection, and as sustaining the above quotations and our contention in this entire case, we ask attention to the following cases heretofore decided in this Court, viz:

Klinger vs. Missouri, 13 Wall., 257, 263.
Chouteau vs. Gibson, 111 U. S., 200.
Otis vs. Oregon Steamship Co., 116 U. S., 548.
Jacks vs. Helena, 115 U. S., 288-9.
Adams Co. vs. B. & Mo. R. R., 112 U. S., 123.
De Saussure vs. Gollard, 127 U. S., 232.
Cook Co. vs. Canal & Dock Co., 138 U. S., 635.
McLaughlin vs. Turner, 154 U. S., 663.
Hopkins vs. McLure, 133 U. S., 380.
Blount vs. Walker, 134 U. S., 607.
New Orleans vs. Waterworks Co., 142 U. S., 84.
Brown vs. Atwood, 92 U. S., 327-9.
Nichols vs. Levy, 5 Wall., 433.
Bank vs. Citizens' Bank of La., 14 Wall., 9.
Sevier vs. Haskell, 14 Wall., 13, 14.
Gibson vs. Chouteau, 8 Wall., 314.
Commercial Bank vs. Rochester, 15 Wall., 639.

The Kansas Statute of 1881, section 7, chapter 161, read:

"*Section 7.* Any person or persons who shall drive or cause to be driven into or through any county in this state any of the cattle mentioned in section 1 of this act, in violation of this act, shall be liable to the party injured for all damages

that may arise from the communication of disease from cattle so driven, to be recovered in civil action; and the party so injured shall have a lien upon the cattle so driven."

This section was materially amended by chapter 201 of the Laws of 1891. Ten years' experience had convinced the legislature that the old law was inadequate, and the legislature saw fit to amend. Every amendment of a law should be construed as intended to accomplish something, and every new word used, or new provision adopted, is to be extended to the extent the language goes, to effect the desired change.

The law above quoted required that before any liability occurred by such driving, the cattle were in fact to be diseased with Texas fever. The new law changed that by fixing the liability where the cattle were either liable to or capable of communicating that disease and did communicate it. The old law gave the party injured a lien upon the cattle. The new law gives a first lien, and we here quote the section as it now stands and as it stood during all the time involved in this suit.

"*Section 7.* Any person or persons who shall drive, ship or transport or cause to be shipped, driven or transported into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease of Texas, splenic or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic, or Spanish fever."

Section 7, just quoted, and being really an amendment of section 7 of the Laws of 1881, is numbered section 3 of chapter 201, of the Laws of 1891.

Section 4 of said chapter 201 is section 6775 of the General Statutes of 1889, amended, and reads as follows:

"In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving, or

keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offence was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle, shall show by such certificate or certificates, as shall hereafter be designated by the Live Stock Sanitary Commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto."

The most casual examination of the law of 1881 shows that it was drawn in the light of regarding the Texas cattle, which communicated the disease to our cattle, as themselves diseased. While this is a mooted question, the prevailing practical and scientific opinion is that the Texas cattle are not diseased, but it is conceded by everyone, and clearly shown in this record, that the thing imparted by the Texas cattle to our domestic herds is a disease when they get it; and the many hundred carcasses strewn along the route of travel would clearly demonstrate that fact.

The Legislature must be presumed to have known what everyone else knows, that Kansas has no commercial waterways, and therefore the words "ship" and "transport" aptly apply to railroads. Besides the law of 1891 (section 4, above quoted,) introduces a new element of knowledge and gives a new warning, and under the statute the railroad company did know that the cattle came from Southern Texas, hundreds of miles south of the Kansas line, and therefore would probably communicate this disease.

The Legislature of Kansas at its special session in 1884, chapter 5, enacted:

"That the Live Stock Sanitary Commission be authorized and directed to cooperate with the Commissioner of Agriculture of the United States, or any officer or authority of the

general government, in the suppression and extirpation of any and all contagious diseases among domestic animals, and in the enforcement and execution of any and all acts of Congress to prevent the importation or exportation of diseased cattle, and the spread of infectious or contagious disease among domestic animals."

Approved March 24, 1884.

We can imagine no line of reasoning which can show either, *first*, that Congress undertook by law or by authority conferred upon the Department of Agriculture to state that any shipment of cattle was safe. Or, *second*, that the least conflict exists between the Kansas law and any act of Congress or any regulation of the Department of Agriculture.

Permits, so-called, are pleaded, and yet there is no law, with which we are familiar, that gives any authority for issuing them, unless they are what are termed "certificates" in section 4 of the Kansas Statute above quoted, and it is insisted that they could not apply because Pecos county, where these cattle had roamed, is south of the thirty-first degree of north latitude, and Midland, Texas, where they were shipped, lies south of the thirty-second degree of north latitude.

We assert that neither the Congress nor the Department of Agriculture attempted to fix the liability or non-liability of railroads for unloading dangerous cattle in Kansas, and again insist that there is no conflict between the State and National authorities. But, if there was such conflict, we do not hesitate to say that the act of Congress, or the action of any Department in that regard, would be cleary in violation of the rights of the State and the people thereof, because trenching upon the police power.

11.

This Court is without jurisdiction even though there is a Federal question presented, because the pleadings, proof and decision were broad enough to sustain the judgment under the Common Law.

No question of practice seems to be more firmly established by this Court than this: that when a State Court has decided the case generally against the plaintiff in error, and there is in the case a Federal question, and also another question not Federal in its character, broad enough to sustain the decision of the Court below, this Court will not take jurisdiction to decide the case.

This view has been taken very many times by this Court.

"Where the Supreme Court of a State decides a Federal "question in rendering a judgment, and also decides against the "plaintiffs in error on an independent ground not involving a "Federal question and broad enough to maintain the judgment, "the writ of error will be dismissed without considering the "Federal question." Hale vs. Akers, 132, U. S., 554, 563.

"It must be that such question was necessarily involved in "the decision, and that the State Court would not have given "judgment without deciding it" Railroad Company vs. Peck 4 Wall., 160, 161.

"It is well settled that where the Supreme Court of a State "decides a Federal question in rendering a judgment, and also "decides against the plaintiff in error upon an independent "ground not involving a Federal question and broad enough to "maintain the judgment, the writ of error will be dismissed "without considering the Federal question.

Hammond vs. Johnson, 142, U. S., 78.

"In cases brought here by writ of error to the State Courts, this Court will not entertain jurisdiction if it appears that besides the Federal question decided by the State Court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it. Kennebeck & Portland Railroad Company vs. Patten, Trustee, 14, Wal. 23.

This doctrine has been repeated so often by this Court that we cite no further authorities.

Now in the case at bar it is true that the plaintiff and cross-petitioners set out and counted upon the State statute forbidding the introduction of cattle liable to impart Texas fever, and alleged that the acts of the railway were in violation of those statutes, but the petitions also set out facts which would clearly establish a liability at common law. Upon the trial of the case the plaintiffs did not rest upon the showing that these Hosier cattle were "wild and of undomesticated habits," and were "from south of the thirty-seventh parallel of north latitude," as being *prima facie* evidence "that such cattle were capable of communicating and liable to impart Texas, splenic, or Spanish fever," as provided in the Kansas statutes, but they went farther than that, and assumed the burden of proving their common law action. Beyond a question, the evidence did abundantly support this view. The Court charged the jury along this line and clearly stated in effect that the plaintiff and cross-petitioners could not recover unless they had proven the common law phase of their action.

Justice Allen, of the Kansas Supreme Court, in his opinion in this case—page 295, printed record—says, "The evidence "shows that ticks, which are regarded as a strong, if not abso- "lutely certain, indication that the cattle are capable of commu- "nicating the disease, were plainly and easily discernable on "many of the cattle; that they were visable to the naked eye "and were seen by witnesses who observed the cattle at Ft. "Worth and at Parsons. Even if this were an action at com- "mon law for negligently spreading the disease, in view of the "now generally known fact that the disease of Texas or splenic "fever may be communicated to the domestic cattle of Kansas "by Texas cattle, and of the legislation in this and neighboring "states, and by Congress recognizing the existence of the disease "*a very strong case is made by the testimony against the com-* "*pany.* We think the instructions were eminently fair, if not "even more favorable than the law is toward the railroad com- "pany. They were told in the fourth instruction that they "must find from the evidence that Texas cattle were brought "into the State by the defendant; that the cattle of the plaintiff "and the cross-petitioning defendants became infected by the "disease imparted to them by such Texas cattle, and that such

"disease was Texas, splenic, or Spanish fever, and 'that the "officers, employees, or agents of the railway company defend- "ant had knowledge that such Texas cattle transported by it "into this State were liable to impart such disease to the native "cattle of this state, or that they ought by the exercise of dili- "gence and care, to have known of the dangerous character of "these cattle, and that they would or were liable to impart said "disease to the native cattle of this State.' There is nothing "in the instructions conflicting with the portion of the charge "above quoted. Under this, no harsh rule requiring the com- "pany to act at its peril with reference to the shipment, was "declared, but the jury w e told that it would only be liable "in case its representativ ailed to exercise care and diligence "to ascertain whether th attle were liable to impart the dis- "ease or not."

Counsel for plaintiff in error will not, we feel sure, claim in this Court that their client would be protected by any act of Congress, by any rule or order of the Secretary of Agriculture, by any permit of any board, from answering in damages, if their company had imported these death-dealing cattle into Kansas, knowing their dangerous character, or, if by the exercise of care and diligence, it or its officers or agents might have known of their dangerous character. No line, word or syllable of the act of Congress which they invoke, or the rules or instructions of the Secretary of Agriculture which they quote, can, by the remotest inference, be construed to give any protection to one willfully or negligently doing an injury to another by bringing into this State the germs of disease. On the contrary, the purpose of that act as expressed in its title is "to prevent the exportation of diseased cattle, and to provide "means for the suppression and extirpation of pleuro-pneumo- "nia, and other contageous diseases among domestic animals."

A common law right of action having therefore been presented in our petition, supported by evidence, fairly submitted to the jury by the instructions of the Court, and decided in favor of the plaintiff, in all of which no Federal question was or could have been presented, this Court will not now interfere, no matter what view it may take upon the question as to whether or not a Federal question was involved.

III.

There is no conflict between the United States Statutes and the State Law.

Arriving at the discussion of the Federal question, we most confidently aver that there is no conflict whatever between the United States Statute—chapter 60, General Statutes, 1884—the rules and orders of the Department of Agriculture promulgated thereunder, and the Statutes of Kansas.

We have already quoted the title of the act of Congress. The purpose is expressed therein. It was designed for the "suppression and extirpation * * * of contageous diseases among domestic animals."

Section one establishes a Bureau of Animal Industry and provides for a chief thereof, and defines his duties.

Section two authorizes the appointment of two competent agents, to examain and report upon the best methods of treating, transporting, and caring for animals and the means to be adopted for the suppression and extirpation of contageous pleuro-pneumonia, and to provide against the spread of other dangerous, contageous infectious and communicable diseases.

Section three makes it the duty of the Commissioner of Agriculture to prepare such rules as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules to the executive authority of each State and Territory, and invite their cooperation in the enforcement of the act. And further provides that whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State, where these diseases exist, or where such State had adopted plans and methods for the suppression of such diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever he shall be notified of the readiness of the State authorities to cooperate with the Commissioner of Agriculture for the extinction of such diseases, the Commissioner of Agriculture is authorized to expend money appropriated by the act to accomplish such purpose.

Sections four and five relate to the foreign trade and have no possible application to the matter in hand.

Section six absolutely prohibits all railroad companies from receiving for transport, and from transporting from one State or Territory to another, *any* live stock affected with any contagious, infections, or communicable disease; but provides that splenic or Texas fever shall not be considered a contagious, infectious or communicable disease, within the meaning of the act, as to cattle being transported to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

Section seven makes it the duty of the Commissioner of Agriculture to notify railroads, steamboats, and other transportation companies doing business through any infected locality, and any person operating such transportation facility who shall knowingly violate the provisions of section six should be guilty of a misdemeanor and punished.

Section eight provides in detail for the stamping out of contagious diseases in the District of Columbia.

Sections nine, ten and eleven have nothing to do with the question at bar.

The regulations promulgated by the Department of Agriculture, and pleaded in the answer of the railway company (Exhibit E, page 26, printed record,) say that the same are issued under section seven of this act of Congress, and notifies the transportation companies that the contagious and infectious disease known as splenic, or Southern fever, exists in certain territory therein described, and warning them that from March 1 to December 1, 1892, *no* cattle are to be transported from said area to any portion of the United States north or west of the line named, except by rail for immediate slaughter, and when transported for that purpose to be under certain named restrictions.

The Kansas Statute counted upon is found in the laws of 1891, at page 346, and is chapter 201 of the Laws of 1891. The section counted upon, and the only one involved in this discussion, is section three, and is as follows:

"Any person who shall drive, ship or transport, or cause "to be shipped, driven or transported into or through any "county in this State, any cattle liable or capable of communi- "cating Texas, splenic, or Spanish fever to any domestic cattle "of this State, shall be liable to any person or persons injured "thereby for all damages that they may sustain by reason "of the communication of said disease of Texas, splenic or "Spanish fever, to be recovered in a civil action in any court "of competent jurisdiction, and the parties so injured shall "have a first and prior lien to all other liens for such damages "on the cattle communicating the disease of Texas, splenic, "or Spanish fever."

The only place where the two acts occupy common ground is in section six of the United States Statute and section three of the State act. We venture with great confidence to predict that counsel for plaintiff in error will be utterly unable to point out any conflict. These two acts lie parallel. They supplement each other. They seek to accomplish the same end. Breaking the one is a breach of the other. Under section six no railroad company within the United States is permitted to transport from one State to another, live stock affected with any contagious, infectious, or communicable disease. Section three steps in and, furthering the same purpose, forbids the transportation of the same class of cattle into or through any county in Kansas. This is cooperation, not conflict, and is in perfect accord and pursuance with the invitation extended to the States found in the United States Statutes and accepted by the State of Kansas by act of its Legislature—chapter five, section one, Laws of 1884.

Counsel also claim that in some illy-defined way the railway company was protected by the order of the Secretary of Agriculture, which was pleaded in the answer. We are at a loss to see how this contention can be maintained. That order is issued under the authority found in section seven, and was a notice that the area mentioned was an infected one This notice was necessary in order to fix the criminal liability imposed by that section and could not, nor did it, assume to in the least moderate or interfere with the prohibition contained in section six. It contained no permission, directly or remotely, for infected or infectious cattle to be shipped from

one State to the other, even though they came from without the proscribed limit—except for immediate slaughter, and the railway company in this case well knew that that was not the purpose of this shipment—and if it had, it would have been to that extent wholly unauthorized and void.

IV.

The Kansas laws involved were a proper and warranted exercise by the State of its inherent police power.

Outside of the District of Columbia and the territories, all proper police power is inherently resident in the states, and in no sense does it belong naturally to, nor in any just sense has it ever been vested in, Congress, nor in the Department of Agriculture. In this connection we refer to the following:

U. S. vs. DeWitt, 9 Wall., 41, 45.
License cases, 5 How., 631.
Barbier vs. Connelly, 113 U. S., 27.
Passenger cases, 7 How., 283.
License Tax cases, 5 Wall., 470.
U. S. vs. Reese, 92 U. S., 214.
U. S. vs. Cruikshanks, 92 U. S., 542, 551.
Slaughter House cases, 16 Wall., 62.
Civil Right cases, 109 U. S., 3.
Tiedeman's Lim. of Police Power, §202.
Munn vs. Illinois, 94 U. S., 113.
Thorpe vs. Rutland R. R. Co., 27 Vt., 149.
Yeasel vs. Anderson, 58 Ills., 254.
Doyle vs. Cont'l Ins. Co., 94 U. S., 535, 541.

In this last case it is said:

"Full power and control over its territories, its citizens, and its business, belong to the State. * * * * * * * The State, * * * * * except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.

"The power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much such regulation may interfere with the movements of commerce."

Gloucester Ferry Co. vs. Penna., 114 U. S., 196.

"It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons affected by contagious or infectious diseases,—a right founded in the sacred law of self-defense. The same principle, may also be conceded, would justify the exclusion of *property* dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive."

Hannibal & St. Jo. R. R. Co. vs. Husen, 95 U. S., 465.
Kemmish vs. Ball, 129 U. S., 217, 221.

"The purpose of the statute (*i. e.*, the Statute of Missouri, very similar to the quoted section of Laws of 1891,) is not to interfere with the commerce between the states, but to exclude from the State and to prohibit the importation thereto of cattle having contagious or infectious diseases, and therefore exclusively for the protection of the property of the citizens of this State against the acts of such persons as use their property in such a way as is dangerous and detrimental to the interests of others.

Grimes vs. Eddy, 28 S. W. Rep., 756.

And again in the same case:

"The power to prevent the importation of diseased or infected cattle into the State and the power to prevent the transportation of said cattle through the State over the great thoroughfares—railroads,—or by river, rests upon very different principles. The one, as has been seen, may be regulated or prohibited by the State in the exercise of its police power, while the other is a plain regulation of interstate commerce, a regulation extending to prohibition."

In Burdick vs. People, 149 Ill., 608, the Supreme Court of that State says:

The deposit in Congress of the power to regulate commerce between the States was not intended to deprive the States of their police power. Under this police power a State

may legislate to promote domestic order, morals and safety; to protect the lives, limbs, quiet and property of all persons within the State; to secure the general comfort, health and prosperity of the State; to prevent crime, pauperism, disturbance of the peace, and all forms of social evils. * * * But many acts of a State may affect or influence commerce without amounting to a regulation of it. State legislation, which is not an obstacle to interstate commerce, and imposes no burden on it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the powers of Congress."

This court, in Mayor of N. Y. vs. Wilson, 11 Peters, at page 139, says:

"A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That,by virtue of this, it is not only the right but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restricted in the manner just stated. That all these powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

V.

If this Court has technical jurisdiction and a Federal question is involved, such Federal question was properly decided by the State Supreme Court; and its judgment should be affirmed.

The argument under this head has been anticipated in the former portions of this brief, and to the extent that such argument is relevant and material under this point, the same is made part hereof by reference, to avoid repetition.

The common law, which we invoke as inherent and manifest in the record, and the Kansas Statutes quoted, com-

pletely justify the judgments complained of. The judgments, in favor of the plaintiff Haber and the one hundred and forty-five defendants who lost cattle by this pestilence through the gross negligence and wrong of the railway company, are authorized both by the common law and the Kansas Statute.

It is popularly believed by the profession that for every legal right denied there is somewhere an appropriate remedy, and that every grevious wrong demands and warrants a redress.

It is not questioned but that the law of Kansas authorized and required these judgments. We believe that we have shown, under point four (4) of this brief, that such law was a proper exercise of the inherent police power of the State. And it would seem that there is now no such general exaltation of the power or rights of the states, or belittling of the authority of the general government, as to call upon the courts, either State or Federal, to strain a point against the one or in favor of the other; but rather that a liberal construction should be adopted in the interest of local self-government and the promotion and protection of local interests. And that the recognized rights of sovereign States to manage their own internal and police affairs might not be interfered with.

The injuries were all occasioned in Kansas, the wrong done in Kansas, and it would not seem improper that a corporation created by the laws of Kansas and in part, at least, for the benefit of its citizens, should respond in damages to those same citizens when it had violated the police laws of that State to their injury. Had persons resident in another State lost these cattle through the negligence of the railroad company and sought redress in the United States Circuit Court at Topeka in a law action, that Court would certainly have administered the Kansas law as we show it to be, and, upon it as well as the common law, have rendered the judgments set out in the record. It is nowhere suggested that the parties who have suffered these damages had any other redress or any other forum.

Confidently believing that there is no conflict between the Federal and State laws, as demonstrated in the third (3)

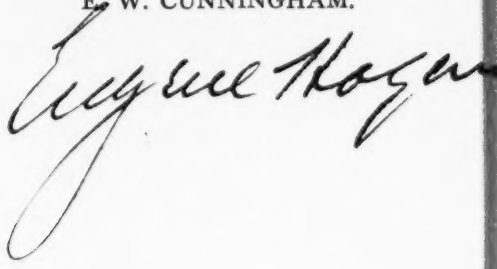
point of this brief, and that no constitutional provision, law, treaty or authority can be cited in criticism of the conclusion reached by the Supreme Court of Kansas, we ask that the writ of error be dismissed, or the judgment of the State Court be affirmed.

The writ of error in this case has long delayed the proceedings upon these judgments to the great harm and cost of these defendants in error, and we think it appears to have been sued out merely for delay. We therefore ask that proper damages be awarded under rule 23, and the case of West Wisconsin Railway Co. vs. Foley, 94 U. S., 100.

We have been unable up to the time of closing this brief to obtain an inspection of the brief of plaintiff in error, and hence are here unable to make a specific answer thereto.

Respectfully submitted on behalf of all of the defendants in error, except Farrington & Lantry.

J. JAY BUCK.
E. W. CUNNINGHAM.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Plaintiff in Error,*

vs.

CHARLES HABER, *et al., Defendants in Error.*

No. 268.

BRIEF AND ARGUMENT FOR FARRINGTON AND LANTRY, DEFENDANTS IN ERROR.

The statement of the case contained in the brief for the other defendants in error is adopted as amply sufficient to advise the Court of the nature of the controversy.

The parties to the record are so numerous, and the interest of these defendants in error so considerable, that we venture to present a separate argument in their behalf.

I.

ON THE RECORD THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE THE QUESTIONS OF CONFLICT BETWEEN THE FEDERAL AND STATE STAT-

UTES, AND THE UNCONSTITUTIONALITY OF THE LATTER, WERE NOT STATED, OR MADE, IN THE STATE COURTS IN PROPER TIME.

The argument for the other defendants in error, that the decision of the State Court is broad enough to sustain the judgment under the common law, found on page 21 *et seq.* of their brief, is irrefragable.

It is also urged that the record affirmatively shows that the questions which the plaintiff in error now asks a review of were raised too late in the progress of the case through the State Courts to entitle it to ask this court to decide them.

The fourth paragraph of the answer alleges in substance—

That the Secretary of Agriculture promulgated certain regulations concerning cattle transportation conformably to Section 7 of the Act of Congress of May 9, 1894, and to the Act of Congress approved March 3, 1891, by which all restrictions in such transportation were removed in that part of the United States where the Secretary had concluded Texas fever did not exist among cattle, and that the cattle in question were shipped from a point north of the locality where such disease existed. (Tr. p. 21.)

In the instructions asked by the railway company in the trial court, the fact of the issuance of

these regulations by the Secretary of Agriculture is recited (p. 263); and the court was requested to declare as matter of law that the Secretary was required by said Act of Congress to establish such rules, and to certify them to the executive authorities of the States and invite their co-operation in the enforcement thereof; to declare as matter of law that the State of Kansas had by statute accepted the provisions of these acts of Congress, and had been co-operating with the federal authorities under such regulations for the suppression and extirpation of diseases among domestic cattle; also that said regulations had become a part of the law of Kansas upon this subject. (Tr. p. 264.)

The plaintiff in error also requested an instruction that as the shipment of the cattle in question was an act of interstate commerce, under the authority of the United States, that the rules and regulations established by the Secretary of Agriculture were "paramount to the authority of the State of Kansas, and, in case of a conflict between the rules and regulations of the United States and those of the State in relation to this cattle shipment, the State laws and regulations must give way." (Tr. p. 266.)

The case then went to the Supreme Court of

the State, and in the petition in error filed therein by the Railway Company, the only reference made to the questions mooted here are these:

"34. The said court erred in not giving to the jury each and every one of the special instructions requested by the plaintiff in error, (one of the defendants below). (Tr. p. 5.)

"49. The said court erred in refusing to instruct the jury that the shipments of cattle were interstate commerce, and controlled by the laws and regulations of the Department of Agriculture of the United States." (Tr. p. 6.)

So far it can hardly be claimed that any assertion of conflict between the Federal and State Statutes, or of the unconstitutionality of the latter has been raised in such a way as to entitle the plaintiff in error here to a decision of either of such questions. There is no averment in the answer of conflict or of unconstitutionality. On the other hand, the tenor of the answer is directly contrary to such a position. It is drawn upon the theory that the Federal and State Statutes were in harmony, and that the authorities of the general and State governments had been and were co-operating in the enforcement of the law along parallel lines. Indeed, it is asserted by the plaintiff in error in one of the instructions asked of the trial court that the

regulation of the Department of Agriculture had been made a portion of the governing law of the State of Kansas by an act of its Legislature. A claim of immunity from liability to the defendants in error was predicated upon this assertion, and the further allegation that an officer of the United States had been authorized by the State authorities to issue permits for the transportation into Kansas of the cattle in question.

The first place in the record where a claim that the law of Kansas is unconstitutional or in conflict with the Federal Statutes is in the petition for a rehearing in the State Supreme Court. (Tr. pp. 298–320.) And the first specific claim that the statute conflicts with the third subdivision of Section 8 of Article 1 of the Constitution of the United States is in the petition for the writ of error. (Tr. p. 322.)

This was too late.

In the case of *California Powder Works v. Davis*, 151 U. S. 389–393, it is said that the question must have been presented to and decided by the Supreme Court of the State, and that such a claim when first made in the petition for a writ of error comes too late.

In *Fowler v. Lamson*, 164 U. S. 252, it is held

that it must appear in the record that a Federal question was raised in the State Court before the entry of final judgment. Otherwise this court is without jurisdiction.

In *Simmerman v. Nebraska*, 116 U. S. 54, this language is used:

"It nowhere appears from this record, . . . that any Federal question was actually presented for consideration, or in any way relied on, before the final judgment from which the writ of error has been taken. Such being the case, we cannot take jurisdiction. *Detroit Railway Co. v. Guthard*, 114 U. S. 134; *Brown v. Colorado*, 106 U. S. 95. The fact that, after the final judgment, and in the petition for a writ of error to this court, which seems to have been treated also as a petition for rehearing, a Federal question was presented, is not enough. It was so decided in *Susquehanna Boom Co, v. West Branch Boom Co.*, 110 U. S. 57. As we said in that case: 'We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests.'"

In *Missouri Pacific Railway Co. v. Fitzgerald*, 160. U. S. 556, the following quotation from the opinion in *California Powder Works v. Davis*, *supra*, is made the basis of that decision:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

And in *Chicago* etc. *Rly. Co. v. City of Chicago*, 164 U. S. 454, reference is made to the Revised Statutes, Section 709, and it is held that:

"This court has no authority to review the final judgment of the highest court of a State in which the decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity, protected by the Constitution of the United States, unless the party against whom such judgment was rendered, 'especially set up or claimed' such right under that instrument."

It is apparent from the foregoing references to the record that the plaintiff in error did not specially set up or claim in the State Courts, or either of them, any right under the Constitution of the United States, except as it may be inferred from the allegation that it was a common carrier of interstate traffic; nor did it claim that there was any conflict between the Federal and State legislation

prior to the filing of the petition for a rehearing in the Supreme Court of the State. It will be noticed that the prayer for instructions in the *nisi prius* court did not ask that court to declare a conflict between the National and State Statutes. It was a request for an instruction that the shipment of cattle in question was an act of interstate commerce, and that as to such shipment the authority of the United States was paramount to that of the State; but it left the question as to whether there was any such conflict to be decided by the jury.

As has been pointed out, the first claim of conflict made by the Railway Company is at page 304 of the record, and this was only by way of argument for a rehearing in the Supreme Court of the State. There it is plainly claimed that the Kansas Statute "was abrogated so far as it undertakes to legislate as to interstate shipments of cattle." And it is also claimed or argued, pages 308–309, that the decision of the Supreme Court struck down the Federal law and denied the authority of the general government to make regulations which would have the effect to abrogate the Statute of the State.

In the petition for the allowance of a writ of error it is averred that the right of the plaintiff in error to ship and transport cattle as a common car-

rier of interstate commerce from north and west of the government quarantine line was denied by the decision of the State Court. It is also averred that certain Statutes of Kansas that prohibit the shipment or transportation into the State of Kansas of cattle from south of the south line of Kansas from February 1st to December 1st of any year, are in conflict with certain acts of Congress and regulations of the Department of Agriculture, and with the Commerce clause of the Constitution; and also with the second subdivision of Article 6 of the Constitution declaring that the Federal Constitution and Statutes shall be the supreme law of the land. It is also stated in said petition that the decision of the State Court was against the claim of unconstitutionality, and against the claim of the plaintiff in error of the right which it had as a common carrier of interstate commerce to transport the cattle in question in the manner it did transport them. And that said decision was further to the effect that the Secretary of Agriculture was without the power to make a regulation as to interstate commerce which would abrogate and annul the laws of Kansas in any degree.

But it is so overwhelmingly settled by the authorities above quoted, and by many others which

it would be mere pedantry to recite, that this claim came too late, that we forbear further discussion of the question, except to call attention to the last expression of the court, made November 1st, 1897, in *Miller v. Cornwall Rld. Co.*, (18 Sup. C. Rep. 34.) The first paragraph of the syllabus is as follows:

"A writ of error to a State Supreme Court cannot be sustained on the ground that the validity of the State Statute, under the Constitution of the United States, was drawn in question, where this ground of invalidity was not set up in the State Courts, except in a motion for a rehearing filed in the State Supreme Court long after it had affirmed the judgment below."

And in the body of the opinion the Court uses this language:

"And under Section 709 of the Revised Statutes, if the ground on which the jurisdiction of this Court is invoked is that the validity of a State law was drawn in question as in conflict with the Constitution of the United States, and the decision of the State Court was in favor of its validity, this must appear on the face of the record, before the decision below can be re-examined here. *Dibble v. Land Co.*, 163 U. S. 63, 70.

The record in this case discloses no attempt to question the validity of the particular statute, in the State Court, as in contravention of the Federal Constitution, unless in the points requested to be

given in the trial Court, and the refusal to give them ; for even if it could be held that such question was raised on the application for reargument, nearly a year after the judgment of the Common Pleas was affirmed by the Supreme Court, the suggestion came too late. *Texas & P. Rld. Co. v. Southern Pac. Co.*, 137 U. S. 48; *Leober v. Schroeder*, 149 U. S. 580; *Pim v. City of St. Louis*, 165 U. S. 273."

THE DECISION OF THE STATE COURT WAS BROAD ENOUGH TO SUSTAIN THE JUDGMENT UNDER THE COMMON LAW.

This has been argued in the brief of our associates, and we only notice it for the purpose of calling attention to the later decisions of this court on that point. The cases even go farther than contended for, as they hold that if the facts are adequate to determine the controversy, and broad enough to maintain the judgment independent of any Federal question, this Court is without jurisdiction, although the State Court may have decided such Federal question.

Eustis v. Bolles, 150 U. S. 361.
Connecticut v. Woodruff, 153 U. S. 689.
Hammond v. Ins. Co., 150 U. S. 633.

THE CONCLUSION OF THE STATE COURT ON THE FACTS IS FINAL.

The assignments of error found in the brief for plaintiff in error may be thus grouped.

Nos. 3, 4 (pp. 51 to 56 of brief) and No. 11 (pp. 68 to 69, brief), each alleges that the State Court erred in the admission of evidence. No. 5 (pp. 61 to 67) alleges like error as to a matter of practice. All these assignments and that part of the opposing argument applicable thereto (especially that under sub-heads IV, V and VI, p.p. 128 to 143 inclusive of brief) all refer to questions which this court, in such a case as this, will not consider.

Assignments Nos. 1 and 2 (p. 51 of brief) simply allege error in the rendition of the judgment. No. 8 (p. 57) alleges error in not holding the Kansas Statute void as in conflict with the Commerce clause of the Constitution, and with Sec. 2, Art. 6 of the Constitution, with the Animal Industry Act and its addendum of March 4, 1891; with the Act of Congress and the amendment thereto regulating commerce, and with the Act of June 15, 1866, "to facilitate commercial, postal and military communication among the several states." This is absolutely the first mention of the last named act.

That in a case like this, this court cannot consider the evidence, and that the findings of fact by

the State Court are conclusive, is settled by abundant authority.

In *Egan v. Hart*, 165 U. S. 188, it ts said:

"The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a State Court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. *Dower v. Richards*, 151 U. S. 658; *Bartlett v. Lockwood*, 160 U. S. 386; *Stanley v. Schwalby*, 162 U. S. 255. True it is that in *Dower v. Richards*, the court (referring to the dictum in *Republican River Bridge Co. v. Kansas Pac. Ry.*, 92 U. S. 315-317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of State Courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower v. Richards*, and in the subsequent cases above referred to.

"It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the ques-

tions presented, and this court may, for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. *Crossley v. City of New Orleans*, 108 U. S. 105; *Gross v. Mortgage Co.*, 108 U. S. 477."

THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE STATUTES.

These statutes have been printed in full in the brief for plaintiff in error, and the Animal Industry Act has been admirably digested on pages 24 and 25 of the brief of our associates It seems to be the impression of counsel for the Railway Company that the Secretary of Agriculture has been clothed with authority to legislate in respect to transportation of cattle, and also to regulate interstate commerce in certain respects. This was not at all the object of Congress in passing the Animal Industry law. The question of interstate commerce was no more in the legislative mind at that time than it was when the act creating the Department of Agriculture was passed. The rules and regulations which the Secretary is authorized to make are not to be in force in any State unless the State shall adopt them, and in that event the only provision is that a part of the appropriation may be used for the benefit of the States whose

authorities accept and adopt his suggestions and are willing to co-operate with him in carrying out the purposes of the act.

Section 3 is the first section which deals with cattle otherwise than as objects of study, or for purposes of foreign commerce, or commerce in the District of Columbia. This section has for its exclusive object the extirpation of diseases or the prevention thereof *within the states* which choose to avail themselves of the assistance of the Department of Agriculture. That must be a strange Federal Statute which can operate "as the Supreme Law of the Land" within any State only by the consent of that State. That no such thing was contemplated by Congress as an exclusive regulation of the subject is clearly indicated by the provisions for the co-operation of the States. Co-operation would be impossible if it was the purpose of Congress to exercise a paramount authority, and to abrogate all State laws on the subject. Congress adopted no quarantine system. It authorized the Department of Agriculture to adopt none. It did authorize the proposal of a system for the States to adopt, and directed the Secretary to co-operate with and financially assist the authorities of such States only as should adopt that system. The depart-

ment was given no power to override the State governments, but was only to assist them with their sovereign permission. The regulations paraded by the plaintiff in error show that the Department of Agriculture so understood the law. At every step it recognizes as in full operation the Quarantine Laws of the State, and the authority of the State officers appointed to enforce them. And the statute on its face shows that the provisions of Section 3 were for application everywhere, and had no special reference to interstate commerce. It is plain that Congress had no thought of exercising by that section its power to regulate commerce between the States.

Section 7 requires notice to common carriers of the existence of contagion in any locality, and declares a punishment for the violation of Section 6 *in such infected locality*. It goes no further than Section 3 in the direction which the plaintiff in error is endeavoring to lead this case.

Section 6 prohibits railroad companies from receiving for transportation and from transporting from one State or Territory to another any live stock affected with any contagious, infectious or communicable disease. The *proviso* is that Texas fever shall not be considered such a disease as to

cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto. No penalty is provided for the violation of this section. Its provisions forbid carriers from receiving or transporting diseased cattle *anywhere*, whether in or out of an infected district. The prohibition treats of the condition of the stock, not with the locality of its reception, and broadly declares that diseased live-stock or those capable of communicating disease shall not be the subject of interstate commerce. The single offense created by the act is committed only where, after official notice that a certain district is infected, a carrier, *within such infected district*, *knowingly* receives diseased live-stock for shipment to another State or Territory.

How is the United States to enforce the rules and regulations prescribed by the Department of Agriculture? The Act does not make even a complete defiance of all of them a penal offense; to ignore or violate them puts the offending party in no peril of punishment. If a railroad company receives cattle elsewhere than in a district already declared infected, or if within a district already so declared, it receives them without *knowing* they are actually affected with a communicable disease,

it may carry them to their destination in another State or Territory and unload them there to spread infection, and the hand of the Federal government cannot be outstretched to punish the wrong.

Section 6 limits its naked and toothless prohibition to *the reception and transportation* of the cattle, and Section 7 provides punishment only for knowingly violating Section 6 *within a declared district;* that is, for knowingly receiving within that district a shipment of stock either diseased or capable of communicating disease. Suppose the carrier received them elsewhere, or innocently received them, but infection is discovered in transit —what is to be done? What, in any case, is to be done with the cattle? Section 7, within the limits of its sphere, provides what shall be done with the culprit; but is silent as to the infected stock. What is to be done to prevent the spreading of the infection? Surely a *quarantine* law ought to say something on these subjects, too! But the act contains not a word except that the Secretary of Agriculture is to prepare rules and regulations on the subject. How is the United States to get these rules and regulations obeyed? Obviously in but one way: the States are to adopt and enforce them as State rules and regulations.

This is precisely what is contemplated by Section 3.

The circular offered in evidence is, upon its face, nothing but the notice to carriers provided for by Section 7 and does not even purport to be the rules and regulations to be certified to the State under Section 3; but whatever those rules and regulations may be when adopted by a State, they then become State — not Federal — laws.

Sections 6 and 7, therefore, contain all that Congress has said on this subject, and aside from mere notice to railroad companies, Section 7 alone is penal.

The contention of the Railway Company is, therefore, reduced to this: Section 6 of the Animal Industry law, which prohibits railroad companies and other carriers from receiving for transportation and from transporting from one State or Territory to another any live stock affected with any contagious, infectious, or communicable disease, is competent, and was intended by Congress, to strike a death-blow to all the carefully framed legislation of Kansas designed for the protection of domestic cattle from destruction by the dread disease of Texas fever.

The argument is this: So long as Congress left the inter-state shipment of cattle free by passing no law at all on the subject, the State of Kansas had power to enact the statutes in question; but Congress, in forbidding inter-state commerce in diseased cattle in any part of the United States, has, *ipso jure*, declared these statutes unconstitutional as an unwarrantable interference with inter-state commerce. This is the most complete and rounded *non sequiter* found in legal literature.

In what respect do the Kansas Statutes conflict with the Federal law? The latter only forbids carriers receiving infected cattle for shipment and from transporting them to another State or Territory; the former forbids the bringing of such cattle into the State of Kansas. The statutes operate upon the subject at opposite extremities and can by no possibility operate on the same act, for the act must be done *outside* the State to fall within the Federal Statute and *inside* the State to fall within the Kansas Statute. It is impossible for these statutes ever to reach a point where one must yield to the other. It cannot be seriously claimed that an Act of Congress forbidding the reception or transportation of diseased cattle elsewhere for shipment into this State, and providing a punishment

for knowingly receiving such cattle within an infected district, has the effect of forbidding the State from preventing the introduction into its territory of live-stock capable of spreading a deadly disease among its native cattle. It is inconceivable that the Act of Congress was intended to trammel the States or to prevent them from protecting the property of their citizens from the dreadful scourge of Texas fever.

On the other hand, Congress carefully refrained from enacting provisions which, however inadequate they might prove, could be construed as excluding the States from this legislative domain. It established a bureau to study the subject and propose measures for the States to adopt as their own if they chose; appropriated money to aid the States in enforcing those measures, and lent to the States the assistance of officers provided and paid by the Federal government. That was all. The Kansas legislature so understood it when, at the same session at which it provided for co-operation with the Commissioner of Agriculture, it passed four other laws covering the entire subject of live-stock quarantine: an Act creating the office of State Veterinarian; an Act creating a live-stock sanitary commission; an Act defining a quarantine

ground; and an Act concerning Texas fever in unorganized counties. The legislature certainly did not understand that its co-operating act was a complete surrender of the State's sovereign power concerning matters of internal police regulation.

The question put in *Morgan v. Louisiana*, 118 U. S. 455, has not, therefore, arisen. On the contrary, what was there said as to the provision by the United States of a general system of quarantine abrogating inconsistent State laws proves our argument to be sound. Here Congress found it expedient to commit to the States under their own laws the enforcement of a quarantine system which touches inter-state commerce and deliberately pledged its aid and assistance in the enforcement of such laws by forbidding carriers to receive or transport cattle capable of communicating disease. Such a scheme of co-operation found precedent in Title LVIII: The Public Health: (¶ 4792, *et seq.* Rev. Stat. U. S.: Act April 29, 1878, 20 Stat. L. 37.)

Much is said about certain permits said to have been obtained by the Railway Company before it undertook the transportation of these cattle. The reception or rejection of such permits as evidence by the State Court is not a question which will be

debated here; but it may be well to call attention to the fact that neither the Act of Congress, the regulations of the Department of Agriculture, or the laws of Kansas contemplate the issuance of any such documents. By what authority they were issued, or in what way they can shield the Railway Company from responsibility for its negligence, both common law and statutory, in bringing diseased cattle into Kansas, is not apparent. The Kansas Statute provides only for certificates that the cattle have been kept since the first day of December of the previous year west of the twenty-second Meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude. (Laws of 1891, p. 348.)

It is unnecessary to invoke the well settled doctrine that the conflict or repugnance between the Federal and State Statutes must be direct and positive (*Sinnot v. Commissioners of Mobile*, 22 How. 227–243), for there is complete harmony between the legislation of Congress and of the State. There is no disposition to controvert the proposition that the Constitution and laws of the United States are the supreme law of the land, or that in respect of inter-state commerce the authority of Congress is paramount, but it is insisted that this is a question

where it is not only competent for the National and State legislatures to co-operate, but that the danger to be averted and guarded against was one of such magnitude and imminence as to justify and demand such concerted action.

It is not in every respect that the sovereign powers of the Nation and of the States stare each other in the face as jealous enemies. In many respects they commingle and blend for the more perfect protection of the citizen, his liberty and property. As was said by Mr. Justice BRADLEY in his great opinion in the case of *Ex parte Seibold*, 100 U. S. 371-384:

"There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature."

True, this was in a case of claimed conflict between Federal and State legislation as to the election of representatives in Congress, but the principle contended for here, is there so vividly portrayed that we venture still another quotation:

"There is no such conflict between them as to prevent their forming a harmonious system, perfectly capable of being administered and carried out as such." (p. 386.)

AS TO THE ARGUMENT OF OPPOSING COUNSEL THAT THE TRANSPORTATION OF THE CATTLE IN QUESTION WAS INTERSTATE COMMERCE.

There is no disposition to question the fact that a shipment of cattle from Texas to Kansas is interstate in character, and the astonishing thing is that so much space should be wasted on such an elementary proposition. Quotations from Chief Justice Marshall are always instructive; but it smacks somewhat of the kindergarten to argue here that commerce is traffic and intercourse "among the several states."

The authority of *Gibbons v. Ogden*, the accuracy of the definition of commerce made by Mr. Justice Field (then at the zenith of his great mental powers) in *Welton v. Missouri*, and the quotations from other opinions of this court, contained in the opposing brief, are illustrative of the industry and zeal of counsel, but they do not fit the case at bar. The argument deduced from these decisions that from the moment these cattle were tendered for shipment the railway company was exempt from all State law, would inhibit Kansas from preventing the plaintiff in error from transporting into Kansas all the unfortunate victims of yellow fever in New Orleans and Mobile. It would eliminate

from the realm of law the police power of the States. Indeed, this is the precise claim made by the other side. (Page 81 of brief.)

Equally unsound is the astonishing declaration, (page 87) apparently based on a quotation from Cooley's Constitutional Limitations, that the State is excluded from enacting police regulations that in any way affect interstate commerce. Carried to its legitimate conclusion, this argument would prohibit all inspection and quarantine laws, and all statutes for the protection of the life, health and safety of the citizen. No doubt Congress may pass quarantine laws so far as the Constitution gives it power so to do, and doubtless when it does, they will prevail in so far as State laws conflict with them.

It by no means follows, however, as claimed in the opposing brief, that Congress has established a national system of quarantine, or delegated to the Department of Agriculture the power to enforce it. As heretofore seen the object of the act of May 29, 1894, was the investigation of the causes of contagious and infectious diseases among cattle, and an offer of assistance to the States in preventing a spread thereof. True Congress nakedly prohibited carriers of interstate commerce

from receiving or transporting diseased cattle, and made it a crime for them to knowingly receive or transport such diseased cattle after notification that such disease existed in a certain locality. But the labored argument for the plaintiff in error fails to disguise the fact that the plan of Congress was one of co-operation with the States. True, it was made the duty of the Department of Agriculture to prepare rules and regulations for the suppression and extirpation of the diseases mentioned in the Act, but it was left without authority, except to certify its rules and regulations to the executive authorities of the States, and it is plainly the meaning of Congress in Section 3 that such regulations should be without force unless adopted and enforced by the States. Suppose an agent of the plaintiff in error was admittedly guilty of a violation of a regulation of the Department, in what way could he be prosecuted or punished; and if an attempt was made in that direction, how indignantly counsel would resent such an unwarranted interference with the liberty of the citizen; and their indignation would be well founded for such an act could not fall within the purview of Section 7, or any other enactment of Congress. The sophistry that such a regulation becomes a part of the Act or anything more than a

mere *brutum fulmen* would be then made apparent.

Following the argument of the other side (p. 95) it may be here observed that it is a matter of no consequence whatever whether Section 6, so far as carriers are concerned, is to have the word "knowingly" read into it. The only matter of importance here is, that in that section and in Section 7 are found the only commands of Congress to carriers touching the transportation of live stock affected with contagious, infectious or communicable diseases. And with those provisions the Department of Agriculture has nothing to do except to notify carriers of the presence of diseases treated of in the Act in certain localities.

It is true that this action is not predicated on the Act of Congress, and that the defendants in error do not claim the right to recover by virtue thereof. But if they did would it be any truer that carriers are exempt from liability growing out of their negligent acts in spreading this disease simply because Congress has authorized an investigation of diseases affecting live stock, has required one of the officers of the general government to delimit those parts of the country in which such diseases exist, and notify carriers thereof. The corollary of this argument is that if the Secretary of Agriculture

should neglect his duty and fail to give carriers notice, or if Congress had omitted this provision from the Act, then diseased cattle could be transported anywhere and everywhere as the cupidity and greed of carriers might dictate without responsibility to anyone. It will be a sorry day for owners of live stock when this court holds that cattle grazed on a range partly within and partly without the quarantine line fixed by the Secretary of Agriculture, and in a condition which told every observer that they were capable of communicating Texas fever, may be transported by a carrier (cognizant of these facts), with absolute immunity from responsibility. No more stinging parody was ever penned than that of counsel (p. 99) as to the bitter experience of cattle owners in the Western States with this disease. They say that this experience taught the lesson that the subject could only be controlled by a full, complete and comprehensive system of national quarantine; and in response thereto Congress passed the Animal Industry law. They say that this complete system only required the Secretary of Agriculture to establish a quarantine line, and to notify the plaintiff in error that Texas fever existed south and west of that line, and because in the transpor-

tation of these cattle (which were undoubtedly diseased), a permit unknown to the law was obtained that the men whose cattle died by the default of the plaintiff in error must suffer this loss. A wonderful system this, which at the same time strikes down all State quarantine statutes, and exempts the plaintiff in error from all necessity of ordinary care in the transaction of its business.

THE KANSAS LAWS WERE A LEGITIMATE EXERCISE BY THE STATE OF ITS POLICE POWER.

In addition to what has been said in the brief for the other defendants in error, it may be well to briefly advert to a few other considerations and decisions on that question.

In *City of New York v. Miln*, 11 Pet. 102, an Act of the State of New York which inflicted a penalty upon the master of a vessel arriving from a foreign port who neglected to report to the mayor or recorder an account of his passengers, was held to be not a regulation of commerce but of police and not in conflict with the Constitution of the United States. The opinion discusses many questions but the stress of the decision is placed upon what were termed "impregnable positions," and the court speaks as follows:

"That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained; in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." (p. 139.)

In discussing the subject the opinion proceeds:

"Let us compare this power with a mass of power, said by this court in *Gibbons v. Ogden*, 9 Wheat. 1, not to be surrendered to the general government. They are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, &c. To which it may be added, that this court, in *Brown v. The State of Maryland*, 12 Wheat. 419, admits the power of a State to direct the removal of gunpowder, as a branch of the police power, which unquestionably remains, and ought to remain with the States.

"It is easy to show that if these powers, as is admitted, remain with the States, they are stronger examples than the one now in question. The power to pass inspection laws involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound, or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate the internal police.

"Again, the power to pass quarantine laws operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce, and yet it is not only admitted that this power remains with the States, but the laws of the United States expressly sanction the quarantines, and other restraints which shall be required and established by the health laws of any State; and declare that they shall be duly observed by the collectors and all other revenue officers of the United States." (p. 142.)

* * * * * * * *

"We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or

from a ship, the crew of which may be laboring under an infectious disease." (p. 143.)

In *Prigg v. Pennsylvania*, 16 Pet. 539, it is said on page 625, by STORY, J.:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States, in virtue of their general sovereignty. That police power extends over all the subjects within the territorial limits of the States, and has never been conceded to the United States."

This power rests on the maxim: "So use your own that you injure not another's property." It is grounded, like self-defense, on the law of necessity.

2 Hares' Am. Con. Law, pp. 760, 784.
Palairet's Appeal, 5 Am. Rep. 450.

No completely accurate definition of the police power has yet been given. The courts seem disposed to deal with particular cases as they arise, rather than undertake an abstract definition of the term. Most of the books rather describe the phrase than define it. Cooley says:

"The police power of a State, in a comprehensive sense embraces its whole system of internal regulation, by which the State seeks not only to pre-

serve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights by others." (Con. Lim., 5th ed. 706.)

Tiedeman, in his work on the Limitation of the Police Power, pages 289–290, states that this "power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare—in other words, to prevent the infliction of a public injury."

It is useless, however, to depart from the deliverances of this court. It would be interesting to trace the course of the decisions on this subject, but space forbids. The case of *Kimmish v. Ball*, 129 U. S. 217, seems absolutely conclusive of the questions which it is claimed this court should pass on. That case involved the validity of the following statute of Iowa:

Section 4058: "If any person bring into this State any Texas cattle, he shall be fined not exceeding $1,000, or imprisoned in the county jail not exceeding 30 days, unless they have been win-

tered at least one winter north of the southern boundaries of the States of Missouri and Kansas; *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following."

Section 4059: "If any person now or hereafter has in his possession, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section."

The action was based upon this latter section. The petition of the plaintiff alleged that in June, 1885, the defendants were the owners of and had in their possession and under their control a herd of Texas cattle which had not been wintered north of the south boundaries of Missouri and Kansas, and which were purchased at or near Fort Smith in Arkansas; that said cattle, while in the possession and under the control of the defendants, were allowed to run at large in Harrison County, Iowa, and that said cattle were infected with Texas fever which was spread and disseminated by them among the cattle of the plaintiff, whereby they sickened

and died to his damage of $5,000. To this petition the defendant demurred on the grounds, first, that Sections 4058 and 4059, above quoted, are in conflict with Section 8, Article 1, Constitution of the United States, in that the legislature of Iowa undertook by them to regulate and interfere with interstate commerce; and, second, that the sections are in conflict with Section 2, Article 4, Constitution of the United States, relative to the privileges and immunities of the citizens of the several States. The demurrer was heard in the Circuit Court, and the two judges were opposed in opinion. The plaintiff elected to stand on his petition, and judgment was entered for the defendant, sustaining the demurrer according to the opinion of the presiding judge.

Mr. Justice FIELD, after discussing the malady of Texas fever, and ascertaining that cattle coming from southern latitudes are infected with a contagious and dangerous fever, and stating that the legislation in question was founded on these notorious facts, and reciting the language of Section 4059, uses these words:

"We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate

interstate commerce. * * * Nor does the case of *Railroad Co. v. Husen*, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the question presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. 'It is noticeable,' said the court, 'that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not.' Page 469. It interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Page 473. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. Page 472. No attempt was made to show that all Texas,

Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. *Certainly all animals so infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised. Railroad Co. v. Husen* gives no support to the contention of the defendant. There is no necessary dependence of the provisions of Section 4059, imposing a civil liability, upon those of Section 4058; so that the one may not stand without the other. If the criminal liability created by Section 4058 is open to doubt, which we do not affirm, the civil liability may remain for the damages caused by the willful conduct designated in Section 4059. *Packet Co. v. Keokuk*, 95 U. S. 80.; *Allen v. Louisiana*, 103 U. S. 80. * * * The section in question is not u constitutional by reason of any conflict with the commercial clause of the Constitution."

Reliance is placed on *Railroad Co. v. Husen*, but an attentive reading of the opinion in that case shows that the court construed the statute of Missouri there in question as

"A plain regulation of interstate commerce, a regulation extending to prohibition." (p. 469.)

The court further says:

"That the transportation of property from one State to another is a branch of interstate commerce is undeniable, * * * The Missouri Statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power,—that of destruction." (pp. 469–470.)

The cases of *Henderson v. Mayor*, etc., 92 U. S. 259, and *Chy Lung v. Freeman*, 92 U. S. 275, involved no question of quarantine, and simply deny the validity of State legislation, professing to be an exercise of police power, but which really acted directly and discriminatively on international commerce.

Proceeding to later expositions of this doctrine by this court, it is found that the case of *Sentell v. New Orleans & E. R. Co.*, 166 U. S. 698, fully sustains our position. In that case it was held that even if dogs were property in the fullest sense, they would still be subject to the police power of the State; and that a State Statute providing that no dogs shall be entitled to the protection of the law unless placed upon the assessment rolls, and limiting any recovery by the owner for their killing and injury to the value fixed by himself for the purpose of taxation, is within the police power

of the State. In the course of the opinion Mr. Justice BROWN says:

"That a State in a *bona fide* exercise of its police power may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its object the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay, but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing, but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. *Bowditch v. Boston*, 101 U. S. 16; *Mouse's case*, 12 Coke, 63; *Governor* &c. *v. Meredith*, 4 Tenn. R. 794, 797; *Stone v. Mayor* &c. 25 Wend. 157; *Russell v. Mayor* &c. 2 Denio. 461.

"Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments; and in *Lawton v. Steele*, 152 U. S. 133, it was held to be within the power of the State to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable fisheries within the waters of the State."

In *New York &c. v. New York*, 165 U. S. 628, a Statute of New York regulating the heating of steam passenger cars and directing guards and guard posts to be placed on railway bridges and trestles and the approaches thereto, is held to be constitutional, although the cars may be employed in interstate commerce. It was claimed there, as here, that the State legislation in question was in conflict with the Commerce clause of the Federal Constitution; but Mr. Justice HARLAN, speaking for the court, after citing many cases, sustained the validity of the Statute as a proper exercise of the police power of the State, although it incidentally affected commerce among the States and with foreign nations. He says:

"It was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that State by stoves or furnaces kept inside the car or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the State must yield to the acts of Congress passed in execution of the powers conferred upon it by the Constitution (*Gibbons v. Ogden*, 9 Wheat. 1–211), the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to es-

tablish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons traveling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. * * * Why may not regulations to that end be made applicable, within a State, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such State? * * * The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution, a regulation of commerce, *although it controls, in some degree, the conduct of those engaged in such commerce.*"

After noticing a suggestion by counsel that a conflict between State regulations in respect to heating passenger cars used in interstate commerce would make safe and rapid transportation impossible, the learned justice says:

"These possible conveniences cannot affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public according to its own views of necessity and public policy, and so long as Congress deems it

wise not to establish regulations on the subject that would displace any inconsistent regulations in the States covering the same ground."

And noticing the act of June 15th, 1866, (imported into this case for the first time in the brief), it is held that this statute has no bearing on the question before the court, and that the existence of that statute does not interfere in any degree with the enactment by the State, of laws having for their object the personal security of passengers while traveling within their respective limits from one State to another on cars propelled by steam.

The "universality of its presence" has always been recognized; as has the doctrine that in our constitutional system this power has been left with the individual States.

United States v. Dewit, 9 Wall, 41.
Slaughter House Cases, 16 Wall, 36, 62.
Field, J., Dissenting Opinion, 87.
Gibbons v. Ogden, 9 Wheat. 203.

In *Barbier v. Connolly*, 113 U. S. 27, it is said that "the power of the States over police regulations is supreme."

After discussing the matter at some length, Judge COOLEY says:

"Numerous other illustrations might be given of the power in the States to make regulations

affecting commerce, which are sustainable, as regulations of police. Among these, quarantine regulations and health laws of every description will readily suggest themselves. Citing remarks of GRIER, J., in License Cases, 5 How. 632, and License Tax Cases, 5 Wall, 462.

Con. Lim. (2d ed.) 584.

Undoubtedly Congress may establish police regulations in its constitutional fields of action, but it cannot, and has not, attempted to interfere with the States in the matter of excluding contagious and infectious diseases dangerous to life and property. Nor has Congress, by the exercise of its paramount and exclusive authority over interstate commerce the power to say, because a carrier rests under the duty of transporting live stock between the States, that such carrier and such commerce is not subject to the police power of the States so far as necessary to preserve the persons and property of its citizens from the ravages of disease. To do so would be to deny to the States the right of self-defense.

This is the reason why in *Robbins v. Shelby, Taxing District*, 120 U. S. 489, this court was careful to limit its language by declaring that "the only way in which commerce between the States can be legitimately affected by State laws is

where, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property."

It naturally follows that a State may pass laws incidentally affecting interstate commerce, provided such laws *do not discriminate against such commerce, and are not inconsistent or in conflict with Acts of Congress.*

Wilson v. Blackbird Etc. Co., 2 Pet. 245.
Sherlock v. Alling, 93 U. S. 99.
Stone v. Farmers Loan & Trust Co., 116 U. S. 307, 333.

Hennington v. Georgia, 163 U. S. 299, holds that a State Statute making it a misdemeanor to run a freight train in the State on the Sabbath day is a regulation of internal police and not of commerce in its effect on a train of interstate freight.

Extracts from the opinion by HARLAN, J.:

"So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the States have to make provision for the health and safety of their people.

"Local laws of the character mentioned have their source in the powers which the States reserved, and never surrendered to Congress, of pro-

viding for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce, simply because for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The Statute of Georgia is not directed against interstate Commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate.

"We are of the opinion that such a law, although in a limited degree affecting interstate Commerce, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate Commerce, but, considered in its own nature, is an ordinary police regulation, designed to secure the well-being and to promote the general welfare of the people within the state by which it was established."

The Court quotes from :

Wilson v. Marsh Co., 2 Pet. 245, 251, 252.
Gilman v. Philadelphia, 3 Wall. 713–729.
Cooley v. Board, 12 How. 299–320.
Owners of Brig James Gray v. Owners of Ship John Fraser, 21 How. 184–187.
R. R. Co. v. Fuller, 17 Wall. 560–567–570.
R. R. Co. v. Husen, 95 U. S. 465–470–473.
Morgan v. Louisiana, 118 U. S. 455–463–465.
Smith v. Alabama, 124 U. S. 465–474–479–482.
Sherlock v. Alling, 93 U. S. 99.
Nashville Ry. Co. v. Alabama, 128 U. S. 96–99–101.

The opinion says that *Wilson v. Marsh Co.* 2 Pet. 245, though often criticized, is still authority in this Court.

See *Pound v. Turck*, 95 U. S. 459–463. That case upholds the Statute of Delaware authorizing the construction of a dam across a navigable creek up which the tide flowed for some distance.

Gilman v. Philadelphia upheld the validity of a statute of Pennsylvania authorizing the construction of a bridge over the Schuylkill river.

The case in 21 How. upheld two ordinances of the City of Charleston, one providing that no vessel should be in the harbor in that city for more than 24 hours; the other requiring all vessels anchored in the harbor to keep a light burning on board from dark until daylight.

R. R. C. Co. v. Fuller upholds a statute of Iowa requiring every railroad company, in September of each year, to fix its rates for the transportation of passengers and freights, and requiring a printed copy of such rates to be posted at all stations.

Smith v. Alabama upheld a statute of that state making it unlawful for a railroad engineer in that State to operate an engine without first undergoing an examination and obtaining a license from the State Board of Examiners.

Nashville v. Alabama involved the validity of a State Statute disqualifying any one from serving on railroad lines who had color blindness and defective vision.

This language is quoted from *Sherlock v. Alling:*

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and the persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

THE STATUTES OF KANSAS DO NOT REGULATE INTERSTATE COMMERCE AND DO NOT CONFLICT WITH THE ANIMAL INDUSTRY ACT OR THE REGULATIONS OF THE DEPARTMENT OF AGRICULTURE.

At page 102 of the brief for plaintiff in error, in reciting some of the provisions of the Kansas statutes, a point is made that the rule of evidence created by Section 6775 does not apply to common carriers. This is not mooted in the assignment of errors, nor has it before been mentioned in the case. But counsel are mistaken in their reading of the section. They say

"the words 'ship or transport' are not used in the section.'"

The language of the Statute, however, is (page 14 of their brief): "Proof that the cattle which such person or persons are charged with *shipping*, driving, etc." * * *

The language is plainly broad enough to cover all cases and all persons and classes of persons. Such was the manifest intention of the Legislature. To hold that the purpose was to omit carriers would be to emasculate the law—for it is common knowledge that the only way in which diseased cattle reach Kansas is by rail. Of the same grade is the argument that the word "person" in Section 6774 does not include common carriers. A corporation is a person within the meaning of the Fourteenth Amendment, although not mentioned—and no stricter rule of construction will be invoked as to this statute, especially when the object of the legislation is borne in mind—knowing, as the Legislature did, that carriers alone would "ship or transport" cattle into the State.

But all this is clearly aside from any Federal question, and belongs to the domain in which the decision of the State Court is final.

It would unreasonably extend this argument to add to what has already been said on the question of conflict, except to note the strange contention that there is such conflict, and that the State is attempting to regulate interstate commerce, because its Supreme Court observed that the plaintiff in error in bringing the cattle in question into Kansas, not only violated the State law, but transgressed also against the Federal Statute.

Of course, if the Secretary of Agriculture by his regulations exempted the Railway Company from observance of the State quarantine laws, and gave it the right to spread contagion among all the native cattle of Kansas, we are quite willing to concede the other power claimed for these regulations —that of repeal for the entire Code of Kansas Statutes covering this question.

Nor is it important (although interesting) to note the maze into which the counsel have fallen as to an imaginary conflict between these regulations and Sections 6774 and 6775 of the Statutes. It is indeed amazing, if not amusing, that an argument should be addressed to this court to the effect that because an officer of the general government is required to notify carriers of the presence of a disease in one part of the country, that, therefore,

as to all other portions thereof such carrier may ignore State health laws, and inflict such damage on helpless and innocent property holders as they please.

It would be an unprofitable task to follow the argument on this head, because it all flows from the central fallacy of a supposed purpose on the part of the State to regulate interstate commerce, and of an imaginary exclusive regulation of the shipment of diseased cattle by Congress.

The "bogie man" of States Rights cannot be thus evoked, nor the peaceful grave of the past thus despoiled. The State has not struck down the Federal Statute—in truth the State has found harmony and reasonable protection for her citizens in the scheme of co-operation proposed by Congress and her legislature. And she has no more desire now to conflict or trespass on the Federal domain than she had in passing her statute directing co-operation between her officers and those of the general government.

We are constrained to call attention to the fact that the cases cited by counsel have no application. These cattle were *diseased*. There was no such question as to the property in the original package and other cases cited (p. 111 *et seq.* op-

posing brief). There can be no doubt that this court has held and will continue to hold that the State has the power to take even a common carrier of interstate commerce by the throat at her threshold, if such carrier insists on bringing within her borders, cattle known of all men who have eyes, to be reeking with a fatal disease. It would be improper to close this part of our argument without adverting to the astonishing statement (p. 114 of brief) that State Inspectors at Fort Worth and Parsons did not deem the cattle in question to be dangerous. While this does not reflect on any Federal question, the statement should be pilloried as without foundation in the record.

With the case of *R. R. Co. v. Husen*, 95 U. S. 465, we are content to rest this case. The Missouri Statute prohibited carriers from bringing *any* cattle of a certain class into the State during two-thirds of the year. The Kansas Statute prohibited only the importation of *cattle capable of communicating disease*. The Kansas law is literally within this authority:

"While a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious and infectious diseases from entering the State, it

cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory."

This is quoted from the fourth paragraph of the syllabus and satisfactorily forecloses the question here at issue.

The Missouri case (*Gilmore v. Rld. Co.*, 67 Mo. 323), cited, was based on the same statute as, and follows the Husen case. And the extract from *Sherlock v. Alling* (93 U. S. pages 99, 103), will be read in connection with the facts in the case. That was an action for a marine tort growing out of a collision of two steamboats on the Ohio River, and the judgment of the State Court was affirmed.

The case of *Minnesota v. Barber*, 136 U. S. 313, is purely one of discrimination in favor of dealers in dressed meat in Minnesota, and may with that remark be safely dismissed from this debate.

THE DUTY OF THE CARRIER TO ACCEPT AND TRANSPORT THE CATTLE IN QUESTION.

The argument of the plaintiff in error under this head is only a variation of that which precedes it. Undoubtedly carriers cannot ordinarily refuse to receive for transportation any commodity which the owner is entitled to have transported. But this duty does not extend to diseased cattle any more

than to infected persons. It could with equal force be argued that plaintiff in error, while Galveston was suffering from yellow fever, was compelled to haul to or from that city victims of that plague, or that it is at all times bound to accept and transport nitro-glycerine in open packages, or petroleum in unboxed or unpacked bottles. The references of counsel to the record (as to facts) are unauthorized, as we think, but if not, the testimony abundantly shows that the cattle were grazed (to the knowledge of the plaintiff in error) on a range partly within and partly without the quarantine line of the Department of Agriculture, and that they were notoriously infected with the tick which seems to be the agency by which the disease of Texas fever is disseminated. In the nitro-glycerine cases, if the express company had been advised of the contents of the package, or if such facts existed as ought to have put it on inquiry as to such contents, the precise converse of the case actually passed on would have been present, and the opposite conclusion must have been reached by the court.

In the extracts from Hutchinson on Carriers, in the nitro-glycerine case, and in the other authorities cited by counsel, the authors are speaking of packages the contents of which could not be known

without breaking the package — here we are treating of cattle that were plainly affected with the tick that carries and communicates the disease — so plainly (as the court below found) that everyone but the Railway Company discovered them.

The mad race of the plaintiff in error to secure the business from a competing carrier had obscured this patent fact from its understanding, and the zeal of counsel has blinded their vision so that the record is mistakenly quoted in many instances — notably in the repeated statements that the Railway Company had no notice, or means of knowledge, that the cattle came from the infected district, and were notoriously laden with Texas fever ticks. Happily it is unnecessary to burden the court with more than this simple statement, for all these facts are a sealed book in this inquiry.

THE DECISION OF THE STATE COURT THAT THE RAILWAY COMPANY DID VIOLATE THE KANSAS QUARANTINE LAW IS FINAL.

Hence it would be a waste of time to combat the argument found on pp. 134 to 138 of the brief of the plaintiff in error.

THE REMOTENESS OF THE INJURY.

This is another topic which does not belong in this forum. It would, if necessary, be easy to

demonstrate from the record that the Railway Company was a party to, or at least paid the expense of driving the cattle across the country from the station where they were unloaded from the cars to the ranch of Hosier Bros., and that in making the contract of carriage this drive was provided for.

So, also, the criticism on the charge to the jury of the trial court is out of place. The instruction, however, needs no defense. The contract for the shipment of these cattle was made with the agents of the plaintiff in error, it knew where they were to come from and where they were to go; it undertook the performance of the entire service—and the instruction simply announced the familiar doctrine that the carrier was bound to exercise ordinary care in the performance of its business; that it was not bound to accept for carriage or to transport any article forbidden by the law to be transported or the transportation of which would injure others, provided it could ascertain by due diligence that such article was liable to injure or cause damage to those with whom it might come in contact during its journey.

THE CAUTIONARY RULE OF THIS COURT AS TO THE MEANING OF ITS DELIVERANCES.

The facts that called forth the language quoted by opposing counsel from decisions of this court,

under the first two heads of their brief, are so diverse and so utterly dissimilar from those disclosed in this record that no apology is needed for the invocation of the cautionary rule that, in determining the scope of its deliverances, in their application to subsequent cases, the *precise facts* of the particular case in hand are to be carefully kept in mind. Under this rule detached passages from an opinion may not be torn from their context; nor can general expressions, which, taken by themselves, may be susceptible of a given construction, be extended beyond the case actually under consideration. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Hans v. Louisiana*, 134 U. S. 1, 20; *Plumley v. Massachusetts*, 155 U. S. 461, 474.

In hardly any of the authorities cited (and under which it is argued the State was powerless to protect the live-stock of her citizens from the invasion of a death-laden disease) was the factor of the police power of the State more than remotely present; nor was the court dealing with anything except obvious attempts by a State or municipality to regulate commerce—or instrumentalities of commerce—between the States or with foreign nations. The police power of the States has nowhere found a more vigorous or consistent champion than in this

court ; nor have aggressions on that power elsewhere been so ably and effectively suppressed.

Much of the meandering matter has been provoked by the voluminous opposing brief, and the pardon of the Court is prayed for all departures from the real questions at issue.

They are :

1. The Federal questions—if any there are—were not raised in time or form to entitle the plaintiff in error to have them reviewed.

2. There is no Federal question involved. (See brief of Messrs. Buck and Cunningham, pp. 10-20.)

3. The pleadings, proof and decision of the State court are broad enough to sustain the judgment without reference to the so-called Federal questions.

4. There is no conflict between the Federal and State Statutes. They form a scheme of co-operation, the execution of which depends on and is remitted to the States, except as to a single act not involved in this case.

5. The Kansas Statutes are a proper and warranted exercise by the State of its police power, and are Constitutional.

Equally with our brethern on the other side we invoke the careful consideration of the court. The

case is indeed of transcendent importance to the people of the cattle growing portion of the country, for they desire to know whether the States are powerless to repel a pestilence even when the invasion is made by a carrier of commerce between the States, and to understand whether losses (such as these judgments will partially compensate) can be ruthlessly inflicted under a supposed mantle of Federal protection.

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Attorneys for Farrington and Lantry.

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[redacted]

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

REPLY TO

"Memoranda of Counsel for Plaintiff in Error Touching R. R. Co., vs. Hunt, 95 U. S., 565, and Cornish vs. Ball, 120 U. S., 217."

J. JAY BUCK,
E. W. CUNNINGHAM,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Plaintiff in Error*,

vs.

CHARLES HABER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY TO

"Memoranda of Counsel for Plaintiff in Error Touching R. R. Co., vs. Husen, 95 U. S., 465, and Kimmish vs. Ball, 129 U. S., 217."

Through the courtesy of the Clerk we are just in receipt of "Memoranda" by plaintiff in error, drawn and filed since the closing of the oral argument January 27.

We recall vividly the earnestness and zeal displayed by the other side in their lame attempt to show that as a fact the plaintiff in error, as a common carrier, did not know nor suspicion that the cattle so shipped were dangerous to our native cattle, and further, by some occult

reasoning, that the jury had so found. Of course that contention and that effort find no warrant in the record of this case, and is conclusively disproved thereby. Counsel do, however, now retract all they said in that respect and certainly apologize for their criticism of the little presumptive evidence thrown into the Kansas Statute, (but upon which presumptive evidence we did not rely upon the trial), and demonstrate now that the Kansas statute was correct and was upon a proper basis, and that the legislature of Kansas, in adopting that statute, merely announced what all the world knows—where it knows anything about the matter—that those cattle presumptively would communicate the Texas fever. The confession we insist our opponents have made is found on page three of said "Memoranda," and in these words:

"Time has demonstrated as true what was contended by counsel for the constitutionality of the Missouri statute, and what was decided by the supreme courts of Missouri and Illinois prior to the decision by this court of the Husen case, that *all* Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle."

"Time" had demonstrated all these facts before the Kansas statute of 1891 was passed, and therefore all criticism henceforth on that statute should cease.

Immediately following the above quotation on page three of said "Memoranda," we find this expression:

"What has been *done* by this court is more important than what may have been casually *said* in some particular opinion."

We concede that until the judgment in the Husen case was concluded by a realization on final execution, or compliance without the aid of such writ, what was "done" in the Husen case was important and controlling in that case, but in that case only. In other words, the record of the Husen case should control the Husen case and no

other, while the construction placed upon, or interpretation given to that record, as manifested in the opinion of that case and subsequent cases, is what should be regarded as controlling law. The attempt by plaintiff in error to show that this court misunderstood the record in the Husen case, we believe unwarranted, but are indifferent whether they be correct or no; because, as before suggested, the opinion in the Husen case, and this court in Kimmish vs. Ball, 129 U. S., 217 *et seq.*, announces how it "interpreted" the Missouri law (see brief of Hagan and Perry, page 37). That interpretation was that the Missouri law denied the inter-state shipment of *all* Texas cattle and for that reason alone was invalid. Our Kansas law certainly is no stronger than the Iowa law passed upon in Kimmish vs. Ball, and there sustained.

Until reading the aforesaid "Memoranda" we had supposed that it was competent and within the police power of our state to prohibit bringing into Kansas 1,500 head of dangerous animals, unloading them on to our prairies, to be driven twenty-five miles over our highways, pastured often by our domestic cattle. We now find on page two of said "Memoranda" a proposition which we believe was never argued in any supreme court before, never insisted upon before, and is not only not warranted by any decision of this court but stands impeached by every decision this court has ever rendered where the subject was fairly presented and elaborately discussed, viz: "Therefore our contention is that the Husen case broadly denies the power of the state to forbid the transportation of cattle capable of communicating disease from one state into or through another state, and to now sustain the constitutionality of the Kansas statute will be to practically overrule the Husen case."

We regard this as robust sophistry, and modestly suggest that if the Husen case meant and means what it is interpreted to mean by this "Memoranda," the sooner

it is overruled the better; because if it is so to be interpreted it becomes a *rara avis* in judicial decisions. Again, if the contention and interpretation of plaintiff in error is now to be announced as the rule of this Court, it, by one fell swoop, annihilates and overrules a score or more of carefully written opinions of this Court announcing the doctrine that police power and the management of internal affairs was by our form of government left with the several states for disposition.

If time has demonstrated that all Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle, then time has vindicated the right of the several states, under the police power inherent in them, to utterly prohibit the importation.

"It will be a sad day" for the rights of the individual states of this Union and their authority to enact laws under their reserved police powers, if this Court, by adopting the views of counsel expressed in said "Memoranda," shall effectually deny said rights to the sovereign states.

J. JAY BUCK,
E. W. CUNNINGHAM,
Counsel for Defendants in Error.